No. 85-1084

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In the Supreme Court of the United States

October Term, 1985

CITY OF INDEPENDENCE and JOHN J. NICASTRO on behalf of the SAVE OUR INDEPENDENCE LAND COMMITTEE and JOHN J. NICASTRO on behalf of the INDEPENDENCE HOMEOWNERS-CITIZENS ASSOCIATION, INC.,

Petitioners,

vs.

WARREN TYLER, DIRECTOR OF ENVIRONMENTAL PROTECTION and PETE BOYAS, INDEPENDENCE DEVELOPMENT SANITARY LANDFILL, BOYAS EXCAVATING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, TENTH APPELLATE DISTRICT FRANKLIN COUNTY, OHIO

BRIEF OF RESPONDENT PETE BOYAS, ETC. IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE OHIO DIRECTOR OF ENVIRONMENTAL PROTECTION MUST DECLINE TO REVIEW AND APPROVE PLANS FOR A SANITARY LANDFILL ON LAND IN THE VICINITY OF A NATIONAL PARK.

2. WHETHER A STATE COURT REVIEWING AN ADMINISTRATIVE DECISION CONCERNING PLANS TO INSTALL A SANITARY LANDFILL ON LANDS IN THE VICINITY OF A NATIONAL PARK MUST ORDER THE PLANS REJECTED BECAUSE CONGRESS, TWO AND ONE-HALF YEARS AFTER THE PLANS WERE REVIEWED BY THE AGENCY, ENACTS LEGISLATION THAT MAY OR MAY NOT PERTAIN TO THE FACILITY IF CONSTRUCTED.

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CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article I, Section 8, Clause 17:

The Congress shall have Power . . .

* * *

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of particular

States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

STATUTORY PROVISIONS INVOLVED

United States Code, Title 16: Section 1c(a) National park system: administration; declaration of findings and purpose; general provisions—Definition:

The "national park system" shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.

Title 40: Section 255 Title to land to be purchased by United States; acquisition by United States of jurisdiction over lands:

. . . but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a

notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

Ohio Revised Code, §159.03 Consent of state given to acquisition by United States of land required for government purposes:

The consent of the state is given, in accordance with clause 17, Section 8, Article I, United States Constitution, to the acquisition, between May 6, 1902, and the effective date of this amendment, by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government. On and after the effective date of this amendment, the consent of the state is given, in accordance with clause 17, Section 8, Article I, United States Constitution, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this state required for sites for national parks, national monuments, or national recreational areas provided acquisition of such land commenced prior to the effective date of this amendment.

Ohio Revised Code, §159.04 Exclusive jurisdiction over land ceded to the United States; exceptions; retrocession:

(A) Exclusive jurisdiction in and over any land acquired by the United States under section 159.03

of the Revised Code is hereby ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state. The jurisdiction so ceded shall continue no longer than the said United States owns such lands.

(B) The governor may accept, on behalf of the state, retrocession of full or partial jurisdiction over any roads, highways, or other lands in federal enclaves where the appropriate federal authority offers the retrocession. The governor shall deliver the documents executed by the federal authority and the governor concurring in the retrocession, for recording, to the office of the recorder of the county in which the lands are located.

Ohio Revised Code, §159.05 Jurisdiction shall vest; voting:

The jurisdiction ceded under section 159.04 of the Revised Code shall not vest until the United States has acquired title to the lands by purchase, condemnation, or otherwise. As long as the lands whose acquisition is consented to by section 159.03 of the Revised Code remain the property of the United States they are exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state. Sections 159.03 to 159.06 of the Revised Code do not prevent any officers, employees, or inmates of any national asylum for disabled volunteer soldiers located on any such land over which jurisdiction is ceded, who are qualified voters of this state from exercising the right of suffrage at all township, county, and state elections in any township in which such national asylum is located.

Ohio Revised Code, §3745.06 Appeals to courts of appeals.

> Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin County, . . .
>
> * * *
>
> In hearing the appeal, the court is confined to the record as certified to it by the board.

STATEMENT OF FACTS

On February 1, 1982, the Director of Environmental Protection of the State of Ohio ("Director") issued a permit to install a sanitary landfill to Boyas Excavating, Inc. ("Boyas") on a site in the City of Independence, Ohio composed of 31 acres, 17 acres of which is a hole 225 feet deep created by the mining of shale by the Hydraulic Press Brick Company ("Hydraulic").

Petitioners appealed the action of the Director to the Environmental Board of Review ("Board"). Among Petitioners' 25 assignments of error was one which contended that the action of the Director was unlawful in that Congress had pre-empted his authority to issue the permit by creating the Cuyahoga Valley National Recreation Area ("Park"). The site is depicted upon the boundary map of the Cuyahoga Valley National Recreation Area. The site is located in an industrial area along a narrow corridor that leads to the main body of the Park. The Board overruled that assignment of Petitioners, finding that the site was so isolated from the Park that a sanitary landfill located there would have no impact upon the Park (Petition, A54). Petitioners appealed to the Franklin County Court of Appeals. While the appeal was pending, Congress

enacted Public Law 98-506, set forth at page 5 of the Petition, regulating the operation of a landfill within the boundary of any unit of the National Park System. Petitioners filed a supplemental brief, arguing that the enactment of Public Law 98-506 required the court to overrule the Board and to invalidate the action of the Director. The court rejected the argument of Petitioners, holding that it was confined by statute to the record of the proceedings below, which did not include consideration of Public Law 98-506, that the Director and Board were confined by state law to consideration only of environmental factors, and that the argument raised by Petitioners was properly addressed in another forum (Petition, A10-11). Citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), the court held that the creation of the Park could not be construed to pre-empt state law.

Petitioners appealed to the Supreme Court of Ohio, which declined jurisdiction. Thereupon, they filed this Petition.

REASON WHY THE WRIT SHOULD BE DENIED

THE ISSUES RAISED BY PETITIONERS WERE NOT CAPABLE OF ADJUDICATION IN THE FORUMS BELOW, WERE NOT FINALLY DETERMINED BELOW, AND ARE NOT RIPE FOR ADJUDICATION BY THIS COURT.

Petitioners urge that the Ohio law establishing the Environmental Protection Agency and ascribing to it its duties was pre-empted by the Federal legislation establishing the Park and that the Director was proscribed from even reviewing plans for a landfill in the vicinity of

the Park by the Congressional action establishing the Park. The employees of the Director reviewing the plans were engineers and geologists. Their training and responsibilities are technical. In their opinion the site, consisting of a hole encapsulated by relatively impermeable shale, made an ideal landfill site. The Director and his staff either were unaware of petitioners' proposition or rejected it. The Board, in its Fifth Conclusion of Law (Petition, A54) held that the Director was not required to resolve the question. The Court of Appeals held that the legislation establishing the Park neither expressly nor impliedly pre-empted jurisdiction of the state over lands not acquired by the United States (Petition, A10).

Petitioners' premise is wrong. We submit that the site is not in the Park. A unit of the National Park System is defined at 16 U.S.C. §1c(a) as land and water administered by the Secretary of the Interior through the National Park Service. 16 U.S.C. §460ff (Petition, p. 3), the enabling legislation for the Park, specifically states that the Hydraulic property, when acquired "shall be administered as part of the recreation area". Not only has the property not been acquired, but as pointed out by the Court of Appeals (Petition, A9), a representative of the National Park Service testified before the Board that the Service did not intend to acquire the Hydraulic property and had no use for the pit. Congress established the Park but the Hydraulic property is not owned or administered by the Park Service.

As pointed out by the Court of Appeals (Petition, A10), a serious constitutional question arises if the United States of America declines to acquire the property, but accomplishes its purpose through regulation. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Ob-

viously, a state administrative proceeding is not an appropriate forum to consider a Fifth Amendment compensation claim.

Nor was that forum appropriate to consider the jurisdictional prerogatives of the United States and the State of Ohio. The Constitution provides in clause 17 of Section 8 of Article I that Congress may exercise authority over lands purchased in a state with the consent of the legislature of the state. Ohio, through the enactment of R.C. §§159.03 to 159.05, granted consent for the acquisition of lands for the Park, but specifically ceded jurisdiction to the United States only over those lands actually acquired by it. As the Court of Appeals pointed out (Petition, A9), the Secretary of the Interior has not utilized the procedures provided by 40 U.S.C. §255 to obtain jurisdiction from the state over lands not acquired by him and is administering only those lands actually acquired.

Public Law 98-506, 16 U.S.C. §4601-22(C), enacted two and a half years after the permit was issued, is not relevant to these proceedings. The Court of Appeals, in its review of the action of the Board, is restricted by Section 3745.06 of the Ohio Revised Code to the record certified by the Board. Since Public Law 98-506 had not been enacted at the time of the hearing before the Board, it was not even considered by the Board.

The Administrative agencies of the State of Ohio declined to adjudicate and determine the interests of the United States as advocated by Petitioners. Presentation of those contentions is appropriately made by the United States as a party in a forum competent to adjudicate them.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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